90-188

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

International Consulting Services, Inc.
Petitioner

vs.

Richard K. Gilbert, Esquire
Respondent

Petition for Writ of Certiorari

To the United States Court of Appeals
For the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Protect the Integrity of The Supreme Court Bar: Should the United States Supreme Court take special notice of, and review, a case which involves allegations of conduct unbecoming a member of its own Bar -- including, but not limited to : conversion, theft, using stolen material (such material being the property of Plaintiff) in two cases before the United States Court of Appeals for the D.C. Circuit and in one case before the U.S. District Court for the District of Columbia, and refusing to pay amounts admittedly due under contract.

Violation of Right to Trial by Jury: In a diversity action, where a Plaintiff has plead three alternative causes of action (Breach of Contract, Quantum Meruit, and Conversion), and exercised its right to a Jury Trial -- May

the District Court Judge, without the benefit of a jury, dismiss the entire case for lack of minimum jurisdictional amount under its Count 1 (Breach of Contract) where: (a) the compensatory damages under Count 2 (Quantum Meruit) exceeded the jurisdictional minimum, (b) the compensatory damages under Count 3 (Conversion) exceeded the jurisdictional minimum, (c) the punitive damages sought in the case exceeded the jurisdictional minimum, (d) the punitive damages claim and the conversion claim each involve demands for unliquidated damages under which the "minimum jurisdictional amount" issue is inextricable bound up with the merits of the controversy, and (e) the case involves the allegedly tortious and criminal conduct of an attorney/Defendant who is a member of the bars of the District of Columbia and of the United States Supreme Court.

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Petition for Writ of Certiorari

Now Comes Petitioner, International Consulting Services, Inc., and respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals summarily affirming a United States District Court dismissal under 28 U.S.C. 1332(a).

OPINIONS BELOW

The Unpublished Order of the Court of Appeals appears in Appendix A to this Petition. The Unpublished Opinions of the United States District Court For The District Of Columbia appear in Appendix B and Appendix C to this Petition.

JURISDICTION

The Court of Appeals' Order in this matter was filed on March 9, 1990. A timely Petition for Rehearing was filed on April 5, 1990. The Court of Appeals' denial of the Petition for Rehearing was issued on May 3, 1990 and is set forth in Appendix D. This Court's jurisdiction is invoked under Title 28, U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh and Fifth Amendements to the United States Constitution and 28 USC 1332 are fully set forth in Appendix E.

STATEMENT OF THE CASE

This case involves a dispute between International Consulting Services, Inc., ("Plaintiff") a small corporation offering to its clients the expert (disability) consulting services of Mr. Abraham Mazur[1] and Richard Gilbert, Esq.[2] ("Defendant"). In December 1983 the Plaintiff and

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[1] Mr. Mazur had been employed from 1948-1976 with the Social Security Administration as (successively) a Claims Examiner, a Claims Reviewer, a Disability Examiner, a Disability Reconsideration Examiner and a Disability Legal Assistant [Plaintiff's Answer to Defendant's Interrogatory 10].

[2] Until commencement of his relationship with Mr. Mazur, Mr. Gilbert had "concentrated his practice in the area of criminal defense work" and had "received no income" from handling any Social Security, personal injury or other disability cases [Defendant's Answers to Plaintiff's Interrogatory 3 & 4].

the Defendant placed a yellow pages ad including specialties in specialties in "social security", "personal injury accidents" and "workman's compensation" and stating "Expert Consultant Available". Plaintiff was to provide all disability consulting services and other legal support services under any matters attracted by this ad -- and was to be paid 50% of all fees generated by these matters. [Plaintiff's Answer to Defendant's Interrogatory 11]. This relationship continued for about a year, and attracted a number of disability cases. In December 1984 the Defendant secretly changed his yellow pages advertising for the following year -- keeping the disability specialty claims but deleting the "Expert Consultant Available" language [Plaintiff's Answer to Defendant's Interrogatory 47]. At the same time as he was deleting this yellow pages reference, the Defendant was giving

Plaintiff various assurances and encouragement to continue working on a number of "large fee" cases [Plaintiff's Answer to Defendant's Interrogatories 47]. In January 1985, the Defendant breached his agreement with the Plaintiff and "terminated" their relationship. [Plaintiff's Answer to Defendant's Interrogatory 48-50]. Plaintiff thereupon, in an effect to mitigate damages, instructed Defendant to return, and make no further use of, Plaintiff's workproduct [Plaintiff's Answer to Defendant's Interrogatory 54].

This Action was originally filed pro se in the United States District Court for the District of Columbia in January 1988. Plaintiff's original Counsel entered the case in February 1988 and filed an Amended Complaint. From that time until the close of discovery on March 31, 1989, the parties engaged in a discovery process which

could only have been described as comprehensive and exhaustive. At the close of discovery Defendant filed a Motion To Dismiss For Lack Of Jurisdiction Under 28 U.S.C. 1332(a).

The Amended Complaint filed by Plaintiff's original counsel in February, 1988 stated three causes of action (Breach of Contract, Quantum Meruit, and Conversion), and demanded a Trial by Jury.

Compensatory Damages were plead in the Amended Complaint, as follows:

Breach of Contract	$ 14,162.55
Quantum Meruit	$ 12,750.00
Conversion	$ 100,000.00

Punitive Damages were plead in the Amended Complaint at One Hundred Thousand Dollars ($100,000).

When discovery closed on March 31, 1989, the record indicated (through sworn answers to interrogatories and documentary evidence provided in response to Defendant's discovery requests) that Plaintiff's quantum meruit compensatory damages actually totalled Fourteen Thousand Nine Hundred Eighty-Seven Dollars and Fifty Cents ($ 14,062.50) as follows:

Interrogatory Number	Matter	Hours
24	Ransom Webb	5.58
25	Muriel Brewster	6.42
26	Mary Sweeney	6.00
27	Jane Morris	90.00
28	Edna Sykes-Smith[3]	19.75
29	Ralph Ferraiuolo	16.50

[3] Defendant is entitled to a credit of $375.00 on the matter [see Plaintiff's Answer to Defendant's Interrogatory 41].

30	Roland Outlaw	137.00
	TOTAL	281.25
		x $50/hr
		$ 14,062.50

Plaintiff's estimates of his "conversion damages" and of reasonable punitive damages remained unchanged.

Immediately following the close of discovery, the Defendant filed a Motion to Dismiss alleging that Plaintiff's "breach of contract damages" were under $10,000.00 -- and thus that the Court lacked jurisdiction pursuant to 28 U.S.C. 1332(a).

Defendant's argument was that the Roland Cutlaw Case "had been lost", and that since $7,421.06 of the Plaintiff's $14,162.55 Breach of Contract damages were

attributable to the Roland Outlaw Case, Plaintiff's "Breach of Contract case" did not meet the $10,000.00 jurisdictional minimum.

Plaintiff both disputed the Defendant's interpretation of the facts, and pointed out that (even if the Defendant's interpretation were adopted by the Court) the Plaintiff's quantum meruit damages, conversion damages, and punitive damages each exceeded $10,000.00.

After the Defendant (with tortious and criminal intent) breached his contract with the Plaintiff and thereby effectively prevented Plaintiff's further performance thereunder, the Defendant did, in fact, "lose" the Roland Outlaw case before the United States Court of Appeals. The Roland Outlaw case, however, was not

"over".[4]

With the help of the Plaintiff and another attorney, the Roland Outlaw case was revived before the Social Security Administration based on arguments originally formulated by the Plaintiff, and rejected by the Defendant. The Roland Outlaw case remains pending before a Social Security Administration Administrative Law Judge -- a final determination not yet having been rendered.

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[4] The contract between the Plaintiff and the Defendant herein stipulated that Plaintiff's performance was to commence with the acceptance of a case, and was to continue through its "final legal adjudication".

> The Plaintiff was to provide disability consulting services on all matters generated by Defendant's new yellow pages ad and other efforts at marketing this new specialty. Once a case was accepted, work under that case was to continue until its final legal adjudication. [Plaintiff's Answer to Defendant's Interrogatory 12].

Additionally, Plaintiff argued that the Defendant's position that the Roland Outlaw case "had been lost" was: (1) irrelevant to Plaintiff's claim of entitlement to quantum meruit damages due to the willful criminal prevention of his performance by the Defendant, (2) irrelevant to Plaintiff's claim of entitlement to conversion damages, and (3) irrelevant to Plaintiff's claim for punitive damages.

On May 18, 1989 District Court dismissed this case for lack of the jurisdictional minimum, stating that Plaintiff and his original attorney knew or should have known that the Outlaw case had been "lost" and that therefore, their breach of contract action damages could not have exceeded $10,000.00.

In footnote 1 of his decision, the District Court simply, and without discussion, refused to consider any

possibility that the Plaintiff could have proven quantum meruit or conversion at trial.

Finally, on page 4 of its opinion, the District Court concluded that "punitive damages clearly are not available in this case" based on his reading of "the undisputed facts presented to the Court". The Order, however, did not detail these allegedly "undisputed facts". Furthermore, the record was filled with facts and factual allegations which could have supported a punitive damage claim depending upon the judgment of the jury. Examples of such allegations (as set forth in Plaintiff's pleadings and answers to discovery) are as follows:

1. Plaintiff's fee under the subject contract was to be calculated and paid after each matter's "final legal adjudication". Similarly, to ensure that each matter was pursued in a manner which would best serve the disabled

client, the parties agreed that the Defendant would continue to solicit and rely upon Plaintiff's expertise through the legal end of each client matter undertaken by them.

2. Plaintiff was the disability expert under the subject agreement. Conversely, the Defendant had absolutely no disability experience -- but rather had concentrated his practice primarily in the area of criminal law and relied completely on Plaintiff in these disability matters.

3. Under the arrangement between the parties, Plaintiff screened all potential disability cases, examined the entire record, and gave the Defendant his expert opinion regarding: the merits of the case, the likelihood of success, and the likelihood of receiving an attorneys fee award. Additionally, the Plaintiff provided the Defendant

with ongoing advice and guidance, both orally and in writing, throughout the pendency of the action.

4. While accepting the benefits of Plaintiff's efforts and experience, Defendant has flagrantly refused to pay Plaintiff even the amounts admittedly owed by him. Portions of this amount have been owed (in liquidated sums) since 1984/85.

5. For most of the matters which the parties worked together, the Defendant failed to make accountings to the Plaintiff of fees collected pursuant to their agreement, and failed to pay Plaintiff his share of those fees which were received.

6. While at the same time the Defendant was advising Plaintiff that their relationship would continue, he secretly placed a new "yellow pages" ad which excluded all references to the Plaintiff.

7. In an effort to exclude the Plaintiff from a very substantial anticipated recovery in the Outlaw, Morris, Sykes-Smith, and Ferraiuolo cases, Defendant deliberately made impossible time demands, deliberately prevented Plaintiff's performance, and then used Plaintiff's inability to meet those demands as a pretext for terminating their relationship.

8. Defendant acted with tortious and criminal intent when he continued to use Plaintiff's workproduct after the Defendant acknowledges receiving Plaintiff's January 17, 1985 telegram forbidding its further use. Plaintiff's telegram followed Defendant's willful breach of contract severing his ongoing relationship with the Plaintiff.

Nonetheless, the District Court granted the Defendant's Motion to Dismiss, and the Court of Appeals summarily affirmed the dismissal.

This dismissal violates the Plaintiff's constitutional right to a trial by jury and his constitutional right to due process. Furthermore, since the Defendant in this case is a member of this Court's Bar, this Court ought to examine this matter with special scrutiny (C.f. Rule 8, United States Supreme Court).

REASONS FOR GRANTING THE WRIT

A Writ of Certiorari should be granted in this case because the actions of the courts below have so far departed from the accepted and usual course of judicial procedures as to call for an exercise of this Court's power of supervision.

While the both District Court's Orders and the Appeals Court's Orders fail to squarely address these important issues,[5] the effect of those Orders is to deny Plaintiff his Due Process, to deny Plaintiff his right to a Jury Trial, and to conflict with various decisions from other Circuits on these issues.

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[5] Article III Section 2(2) provides that the Supreme Court has appellate jurisdiction as to both law and the facts. See also: Marbury v. Madison, 1 Cranch 137, 2 L. Ed. 60 (1803) ("The judicial power of the United States is extended to all cases arising under the constitution").

This case ought to be heard by the Supreme Court for the following reasons:

1. This case ought to be heard by the Supreme Court so to resolve various serious allegations against the integrity and conduct of a member of the Supreme Court Bar -- allegations of matters which would tend to bring the legal profession into disrepute.[6]

2. This case ought to be heard by the Supreme Court in order to settle a conflict between the various Circuits concerning when it may be proper for a Court may dismiss a jury action for lack of the minimum jurisdictional amount.

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[6] Plaintiff further contends that due to the seriousness of these matters, this Court should exercise its equitable and general supervisory powers to order that the Defendant appear and answer (under oath) the charges made against him. [Article III, Section 2(1)(a); Federalist Nos. 80 and 83, Hamilton].

See also: In re Gilbert, 276 U.S. 294 (1928). C.f. Cohen v. Hurley, 366 U.S. 117 (1961).

3. "The judiciary as well as the public is dependent upon professionally ethical conduct of attorneys and thus has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice."[7] The "inherent power" of the Courts to supervise, suspend or debar lawyers "derives from the lawyer's role as an officer of the court which granted admission".[8]

4. "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be

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[7] Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 434 (1982).

[8] In re: Snyder, 472 U.S. 642, 644 (1985).

scrutinized with the utmost care."[9]

By its orders of May 18, 1989 and June 16, 1989 the District Court effectively precluded the jury from deciding the following matters which should have been left to their judgment:

- Factual decisions and inferences relating to whether or not the Defendant prevented the Plaintiff's contract performance in a manner which would permit quantum meruit damages in accordance with applicable D.C. precedent.

- Factual decisions and inferences relating to the Defendant's motivation and intent, and especially concerning his allegedly tortious and criminal behavior

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[9] Beacon Theatres, Inc. v. Hon. Harry C. Westover, 359 U.S. 500, 501 (1959) quoting Dimick v. Schiedt, 293 U.S 474, 486 (1935). C.f. Chauffeurs, Teamsters and Helpers Local No. 391 v. Terry, No 88-1719 (3/20/90)(Opinion of Justice Brennan at page 7) ("If in the rare case a tiebreaker is needed, let us break the tie in favor of jury trial")

and intent.

- Factual decisions and inferences relating to the appropriate measure of punitive damages in this case.

The Plaintiff herein asserts that the Defendant has violated not only the Canons of Ethics applicable to his profession, but also the strong public policy that a member of this Court's Bar must be honest, must not be deceitful and must keep his word and honor his contracts.

As such, the District Court's decision to keep the issues of breach of contract, quantum meruit, conversion and punitive damages from the jury violated Plaintiff's Seventh Amendment right to a Trial by Jury and Plaintiff's Fifth Amendment right to Due Process.

Breach of Contract

It is true that if one were to measure the Plaintiff's breach of contract damages by what the "contract price" would have been if the Defendant had not breached the contract, then the Plaintiff's breach of contract damages would not have exceeded ten thousand dollars. But that is not what happended in this case.

In this case, the amount of money which the Plaintiff was to receive under the contract was dependant upon the profitability of his undertakings with the Defendant. In such cases in the District of Columbia, the rule is clear -- a Defendant who breaches the contract, and prevents the further performance of the Plaintiff, cannot escape his wrongdoing by arguing that the contract turned out not to be profitable. Instead, in the District of Columbia, the Defendant must pay the Plaintiff "breach

of contract damages" which are equal to the amount which the Plaintiff would have received in quantum meruit. See e.g. NTA National Incorporated v. DNC Services Corporation, 511 F. Supp. 210,223 (D.D.C. 1981) and Michael Del Balso, Inc. v. Carozza 78 U.S. App. D.C. 56, 136 F.2d 280 (1943).

In any case, the precise measure of the Plaintiff's damages is a matter for a jury to decide after hearing all the evidence, and not a matter to be pre-empted by a judge who might personally favor one damage approach over one another.

Quantum Meruit

In the District of Columbia (as elsewhere) actions for breach of contract and quantum meruit may appropriately be pursued in the same lawsuit. See e.g. North American Graphite Corporation v. Allan, 184 F.2d

387, 389 (D.C. Cir. 1950). C.f. Federal Rules of Civil Proceedure, Rule 8(e)(2) permitting (and indeed encouraging) the pleading of alternative counts.

Furthermore, in the District of Columbia, where a Defendant wrongfully terminates a contract, and usual breach damages are not sufficient to equitably compensate the Plaintiff, quantum meruit or ("restitution") relief may be awarded by the Judge or Jury hearing the merits. See e.g. Lee v. Foote, 481 A.2d 484, 485 (D.C. App. 1984) and the authorities cited therein[10].

Even without these special circumstances, a clear case of "unjust enrichment" could certainly be supported

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[10] Inber v. Ross, 479 A.2d 1256, 1263 (D.C. 1984); TVL Associates v. A. & M. Construction Corp., 474 A.2d 156, 159 (D.C. 1984); Aiken v. United Broadcasting Co., 238 A. 2d 588, 590 (D.C. 1968); Sterling v. Marshall, 54 A.2d 353, 356 (D.C. 1947); 12 Williston On Contracts 1454 at page 14 (1970); D. Dobbs, Handbook on the Law of Remedies at section 4.2 (1973); 5 Corbin on Contracts at sections 1106 & 1107 (1964); and Restatement (Second) of Contracts section 373 (1981).

here where the Defendant: (a) collected fees on matters where Plaintiff acted as his consultant, (b) admittedly owes Plaintiff at least half of said collected fees, (c) has steadfastly refused to pay said fees to Plaintiff in violation of their agreement, and (d) now attempts to unilaterally disavow his contract and all his contractual obligations with Plaintiff.

Finally, in closing, one additional jurisdictional fact which was totally overlooked by the District Court in its Opinion was the fact that the Defendant's Answer attacked the viability of the instant contract[11] -- leaving quantum meruit as a potentially necessary remedy for the

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[11] Two defenses alleged by the Defendant in this case were "Lack of Privity of Contract" (third affirmative defense) and "Statute of Frauds" (fifth affirmative defense).

If either of these defenses were accepted, there would be no contract to breach and enforce -- and the Plaintiff's action would necessarily be in quantum meruit.

plaintiff in this case.

Conversion

As with alternative actions claiming breach of contract or quantum meruit, alternative actions claiming breach or conversion are encouraged by the the caselaw and rules. See Federal Rules of Civil Procedure, Rule 8(e)(2). See also: R. A Weaver & Associates Inc. v. Hass & Haynie Corporation, 213 U.S. App. D.C. 404, 663 F.2d 168, 173 and at footnote 43 (1980)("A plaintiff need only aver title or ownership in himself to support a cause of action for conversion....If the question of ownership is disputed, it becomes a jury question").

Indeed in R.A. Weaver, supra, the D.C. Court specifically sanctioned a finding and award of both compensatory and punitive damages under "conversion"

even though the defendant argued that it had simply "breached" its contract to pay for the property in question. Conversion lies where the Defendant rightfully obtains possession of the subject property, and then wrongfully refuses to return said property upon demand. Id. This is true even where the Defendant originally took possesion of the property pursuant to the contract. See also Horne v. Francis I DuPont & Co, 428 F. Supp. 1271, 1275 (D.D.C. 1977).

Finally punitive damages in the District of Columbia are available for such a refusal where the facts show a willful disregard of the Plaintiff's rights. See R.A. Weaver, supra and Parker v. Stein, 557 A.2d 1319 (D.C. 1989).

Punitive Damages

With respect to the punitive damages being sought, the following special circumstances were alleged and required rulings which only the jury could render regarding the following:

- The conversion of Plaintiff's work product was done in a manner which showed a "... willful disregard of plaintiff's rights or other circumstances tending to aggravate the injury" See e.g. Parker v. Stein, 557 A.2d 1319 (D.C., 1989).

- By the tortious and criminal intent of the Defendant as shown by his continued unauthorized use of Plaintiff's workproduct and continued refusal to pay even sums which were admittedly due and owing, the Defendant's "breach of contract" in this case "merges with and assumes the character of a willful tort"[See e.g.

Brown v. Coates, 102 U.S. App. D.C. 300, 303, 253 F.2d 36, (1958) and Sere v. Group Hospitalization Inc., 443 A.2d 33 (D.C., 1982)], and indeed allegedly violated Sections 22-3801, 22-3811 and 22-3812 of the DC Code (Theft).[12]

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[12] See Opinion of Justice O'Conner in Browning-Ferris Industries of Vermont Inc. v. Kelco Disposal, Inc, 109 S. Ct. 2909 at 2924 (June 26, 1989):

> "Third, because punitive damages are penal in nature, the court should compare the civil and criminal penalties imposed ... the court should consider not only the possible monetary sanctions, but also any possible prison term."

- The gross violation of the Defendant's own higher standard of professional ethics[13] demands due consideration of a punitive judgement award. See Brown v. Coats, 102 U.S. App. D.C. 300, 303, 253 F.2d 36 (1958), Central Armature Works Inc. v. American Motorists Insurance Company, 520 F.2d 283, 292 (D.D.C. 1980), Financial General Bankshares Inc. v. Metzger, 523 F. Supp. 744 (D.D.C. 1981) and Washington v. Group Hospitalization Inc., 585 F. Supp. 517 (D.D.C. 1984).

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[13] This Court has a special interest in insuring the ethics of the members of its bar (Rule 8, Rules of the Supreme Court).

The record below contains serious allegations regarding the conduct and ethics of a member of this Court's bar.

These allegations of conversion and theft, if proven in a court of law, would not only violate the Code of Professional Responsibility, but would also constitute violations of the criminal law.

Such conduct should not be sanctioned either explicitly or implicitly by the judiciary.

Instead, the District Court took it upon itself to dismiss the action without an evidentiary hearing -- and in its Order did not address any of the special circumstances alleged by the Plaintiff.

In doing so, the Court relied heavily on the decision of the U. S. Court of Appeals for the District of Columbia in Kahal v. J. W. Wilson & Associates, Inc. 218 U.S. App. D.C. 156, 673 F. 2d 547 (1982) which held that punitive dmages would not be available in a breach of contrqact case where the only thing that the plaintiff had plead was the defendant's "bad faith". That case is distinguishable, however, from this case in that (a) this case involves a breach which has taken the "the character of wilful tort" (i.e. conversion), and (b) this case involves a defendant who must be held to a higher standard than the routine defendant.

In that regard, perhaps the most important reason for the possible imposition of punitive damages in this case is the fact that the Defendant's alleged conduct was (if found as fact by the jury) utterly reprehensible for a member of this bar. As such, this Court has a particular institutional interest in protecting the integrity of its own bar.

Furthermore, in the District of Columbia Circuit, punitive damage awards have been permitted to stand where they serve one of the following three goals: to further redress the defendant's wrongs, to punish the

defendant's wrongful conduct, or to deter[14] others from engaging in such wrongful behavior.

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[14] The importance of awarding punitive damages both as a punishment of the defendant and as a future deterrent to others was recently reiterated by the Supreme Court in Browning-Ferris Industries of Vermont Inc. v. Kelco Disposal, Inc, 109 S. Ct. 2909 (June 26, 1989). Indeed, as evidenced by that opinion, this doctrine is as old as the common law and as current as this past Supreme Court term.

> "Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future and as proof of the detestation of the jury to the action itself'. Wilkes v. Wood, Lofft. 1, 18-19, 98 Eng. Rep. 489, 498-499 (K.B.)." Browning Ferris, at p. 2920 ftnte 20.

> "The wrongdoer could also be made to pay an additional sum 'on the ground that every evil deed inflicts a wrong on society in general' W. McKechie, Magna Carta 284-285 (1958)" Browning Ferris, at Opinion of Justice O'Conner, at p 2927.

In this case, the Defendant (a member of the bar charged with maintaining a high standard of ethics and honesty) has allegedly engaged in conduct which could well be viewed as a violation of DC Code 22-3811 when he wrongfully, knowingly and intentionally made "an unauthorized use" of ICS's property. Such a theft by an attorney is clearly a "harm to society" as well as to the Plaintiff hereunder. The imposition of punitive damages in a civil case does not depend upon the filing of a criminal complaint -- but rather can independently be effectuated as a civil punishment and deterrence of such wrongful behavior.

Accordingly, in cases where, as here, the defendant has a special relationship with the plaintiff[15] or where the defendant is bound to a higher standard of professional ethics to protect and ensure the public's utmost trust,[16] juries have special latitude to consider and award punitive damages. See e.g. Brown v. Coats, 102 U.S. App. D.C. 300, 303, 253 F.2d 36 (1958) (real estate agent), Central Armature Works Inc. v. American Motorists Insurance Company, 520 F.2d 283, 292 (D.D.C. 1980) (insurance agent), Financial General Bankshares Inc. v. Metzger, 523 F. Supp. 744 (D.D.C. 1981) (attorney). See Also: Washington v. Group Hospitalization Inc., 585 F. Supp. 517 (D.D.C. 1984), where the District Court quite properly refused to grant summary judgement against a

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[15] In this case the plaintiff and the defendant were partners with a 50-50 fee sharing arrangement.

[16] In this case the defendant was an attorney -- and a member of this Court's bar.

punitive damage claim declaring:

> Defendants argue that punitive damages are inappropriate here because their conduct did not rise to the level of oppressive, willful, and wanton conduct as that of the insurer in Central Armature Works Inc. v. American Motorists Insurance Company, 520 F. Supp 283 (D.D.C. 1980). However, the Central Armature Works facts do not exhaust the types of fact situations in which punitive damages may be awarded by a jury.

(Id. at page 522).

Defendant's arguments below that the plaintiff was not a client of his and that therefore exemplary damages should not lie, ignore the seriousness of the allegations made against the Defendant -- and the fact that an attorney's duty to act in accordance with his/her ethics transcends the attorney-client relationship. See e.g. Canon 1, EC 1-5, and DR 1-102(A)(4). See Also: Attorney Grievance Commission v. Silk, 369 A.2d 70 (Ct App. Md 1977) (Disbarred Attorney for misappropriation of club

funds ($4,621.77) when he was not acting as its lawyer, but rather as its treasurer and president) and Matter of Franklin, 365 A. 2d 1361 (Sup Ct. N.J. 1976) (Suspended Attorney for submitting false expense reports to his employer when he was not acting as its lawyer, but rather as its president).

Split Between The Circuits

Dismissals under Rule 12(b)(1) may only be ordered when it appears "to a legal certainty" that the jurisdictional minimum cannot be met. See e.g. St. Paul Mercury Indemnity Co. v. Red Cab, 303 U.S. 283, 288-289 (1938).

In determining whether or not that jurisdictional minimum cannot be met, both compensatory and punitive damages must be considered by the court. See e.g. Bell

v. Preferred Life Assur. Soc. of Montgomery Alabama, 320 U.S. 238, 240 (1943).

When punitive damages are involved, a case can only be dismissed for lack of jurisdictional amount if a verdict in excess of the jurisdictional minimum "would be excessive and set aside for that reason". Bell, supra. at 243 quoting Barry v. Edmunds, 116 U.S. 550, 565 (1886).

Nonetheless, the Courts must be careful not to use this jurisdictional process as a means of disposing of cases which they otherwise disfavor:

> And of course it would be improper for the judge to dismiss a case merely because he would not allow that amount were he to be the sole trier of the facts or because he would not permit a jury verdict in that amount to stand. Arnold v. Troccoli, 344 F. 842, 846 (2nd Cir 1965).
>
> We have not, however, held that defenses asserted on the merits may be considered and adjudicated on jurisdictional motions. Were the law otherwise, the orderly progress of litigation would be

> disrupted ... Issues going to a federal court's power to decide would be hopelessly confused with the merits themselves. Constitutional questions as to the right to have a jury determine factual issues would lurk in every jurisdictional motion. Zacharia v. Harbor Island Spa, Inc., 684 F.2d 199, 202 (2nd Cir., 1982).

In the years since St. Paul, supra numerous District and Appeals Courts have struggled trying to find a consistent rule for determining when a dismissal would be justified where punitive damages are being sought, or where the amount in dispute may depend upon which version of the facts (and inferences and conclusions drawn therefrom) which one may accept as being true. This topic has been hotly debated over an extended period of time, and many rather scholarly opinions have grappled

with its nuances[17]

These courts, and others, have all been faced with the rather inconsistent state of the law among the lower courts[18] concerning exactly how to treat a case in this posture.

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[17] See e.g. Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 516-518 (dissent of J. Garza) (5 Cir., 1980), Nat. Semiconductor v. Com'l Lovelace Motor Freight, 560 F.Supp. 908, 910-911 (N. D. Illinois, 1983), Brown v. Donielson 334 F.Supp. 294, 299-300 (S. D. Iowa, 1971), and Jones v. Landry, 387 F.2d 102, (5 Cir., 1967).

[18] Such inconsistencies in matters as basic as how and when a Federal Court may decide whether or not it has jurisdiction should not be tolerated.

> To avoid an arbitrary discretion in the Courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them. Federalist, No. 78 (Hamilton).

See also, Federalist, No. 22 ("To produce uniformity in these determinations, they ought to be submitted in the last resort, to one Supreme Court"). The Supreme Court, in turn, has the duty to resolve these doubts, and "to say what the law is". C.f. Marbury v. Madison, 1 Cranch 137, 2 L. Ed. 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is").

Some courts have suggested that the right to a jury trial requires that such challenges to the jurisdictional amount must be resolved by the jury:

> [T]o allow a district court judge to value a plaintiff's claim in a case which involves a demand for unliquidated damages and in which the jurisdictional issue is inextricable bound up with the merits of the controversy is tantamount to depriving the plaintiff of his present statutory right to a jury trial. Deutsch v. Hewes Street Realty Corp., 359 F.2d 96, 100 (2nd Cir., 1966).

> [I]n actions at law where trial by jury is a matter of right, a challenge to the jurisdictional amount may not be adjudicated summarily in the face of timely objection by a party, but must be tried plenarily and submitted for jury determination. Shaffer v. Coty, Inc., 183 F.Supp. 662, 667 (S.D. Calif., 1960).

Other courts have gone to the other extreme and ruled that there is simply no right to a trial by jury for such "jurisdictional" issues:

We are not persuaded by the argument that a

termination prior to trial deprives a "plaintiff of his present statutory right to a jury trial." See Deutsch v. Hewes Street Realty Corp, supra, 359 F.2d at 100. Nelson v. Keefer, 451 F.2d 289, 293 (3rd Cir., 1971).

Since this determination is one of jurisdictional fact, there is no right to have it tried before a jury. Sansone v. Ocean Accident and Guarantee Corp.. 228 F. Supp. 554, 558 at ftnte 5 (E. D. Louisiana, 1964).

Still other courts have expressed a deep concern when weighing these issues whenever "the issue of jurisdictional amount ... is so closely tied to the merits of the cause"... [for otherwise] ... lest under the guise of determining jurisdiction, the merits of the controversy between the parties be summarily decided without the ordinary incidents of a trial, including the right to a jury" Wade v. Rogala, 270 F.2d 280, 285 (3rd Cir. 1959) and Fireman's Fund Ins. Co. v. Railway Express Agency, 253 F. 2d 780, 783 (6th Cir., 1958).

Some courts have suggested that District Courts have the power to value a plaintiff's unliquidated claim and/or claim for punitive damages, and to dismiss such cases (before empaneling a jury) if it appears to the judge that the jurisdictional minimum cannot be met. [See e.g. Turner v. Wilson Line, 242 F.2d 414 (1 Cir.1947) and Leehans v. American Employers Ins. Co., 273 F.2d 72 (5 Cir. 1959)].

On the other hand, other courts have refused to dismiss for lack of jurisdictional amount unless the Plaintiff's allegations were "alleged in bad faith solely to invoke federal jurisdiction, ... [or] were inflated solely to create diversity jurisdiction". Zacharia v. Harbor Island Spa, Inc., 684 F.2d 199, 202 ftnte 2 (2nd Cir., 1982). See also: Jones v. Landry, 387 F.2d 102, 105 (5th Cir 1967) ("The strictness with which the "legal certainty" test

is applied by the Supreme Court is illustrated by the case of Bell v. Preferred Life Assur. Society, 1943, 320 U.S. 238, 64 S.Ct. 5, 88 L.Ed. 15. There, the complaint alleged that the plaintiff had been induced to purchase a certificate of insurance through fraudulent misrepresentations by the defendant's agent as to its value, and claimed $200,000.00 as actual and punitive damages. The record showed that the plaintiff had paid $202.35 on the certificate and that the certificate, upon death or final surrender, had a maximum potential value of $1,000.00. Nonetheless, the court held that it was not apparent to a legal certainty that the plaintiff could not recover in addition sufficient punitive damages to make up the then requisite $3,000.00, and that it was no answer to contend that a verdict, if rendered for that amount, would be excessive and set aside for that reason.").

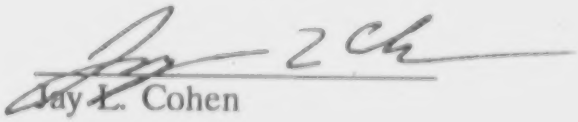
CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals in this matter.

DATED: July 30, 1990

Respectfully Submitted:

JAY L. COHEN, P.C.

By: 
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